**PUBALAN PEREMAL v. PP**

FEDERAL COURT, PUTRAJAYA
ROHANA YUSUF PCA
AZAHAR MOHAMED CJ (MALAYA)
ABANG ISKANDAR CJ (SABAH & SARAWAK)
NALLINI PATHMANATHAN FCJ
VERNON ONG LAM KIAT FCJ
ABDUL RAHMAN SEBLI FCJ
ZALEHA YUSOF FCJ
ZABARIAH MOHD YUSOF FCJ
HASNAH MOHAMMED HASHIM FCJ
[CRIMINAL APPEAL NO: 05(M)-118-05-2018(B)]
13 AUGUST 2020
[2020] CLJ JT(11)

***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – Accused convicted for murder under s. 302 of Penal Code and sentenced to death – Allegation that pathologist's evidence contained infirmities, was lacking and failed to support conviction – Distinction between definitions of culpable homicide and murder – Whether conviction and sentence safe – Whether accused ought to be convicted for culpable homicide for causing such bodily injury as was likely to cause death*

The appellant was charged at the High Court for murder, an offence under s. 302 of the Penal Code ('PC'). The prosecution's narrative revealed that PW9 received a telephone call from the appellant informing that he had stabbed the deceased. PW9 subsequently contacted PW14 and asked him to check on the deceased's condition. Upon arrival at the appellant's house, PW14 found the deceased lying in a pool of blood and he immediately lodged a police report. Other witnesses, PW10, PW17 and PW18, testified that the deceased, while still in a conscious state, uttered the appellant's name when asked as to what had happened. A post-mortem conducted by the pathologist ('PW4') revealed that the deceased died due to multiple incised wounds. At the conclusion of the trial, the appellant was convicted for the offence and sentenced to death. The appellant's appeal to the Court of Appeal, against his conviction and sentence, proved futile. Hence, the present appeal on the grounds that (i) PW4's evidence, a combination of his expert evidence and a reproduction of the post-mortem report, contained infirmities and was lacking; (ii) PW4 did not describe 'the likely and natural effects' of the injuries; (iii) there was no evidence by PW4 to say that the injuries were sufficient, in the ordinary course of death, to cause death; and (iv) the conviction under the third limb of s. 300 of the PC could not be supported by the evidence adduced by PW4's evidence. The appellant's appeal on the issue of constitutionality of the imposition of the death sentence was dealt with in a separate judgment (please refer to *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147).

**Held (setting aside conviction and sentence for murder under s. 302 of Penal Code and substituting with conviction for culpable homicide not amounting to murder under s. 304(a) of Penal Code and sentence of 15 years' imprisonment):**
**Per Vernon Ong Lam Kiat FCJ delivering the judgment of the court:**

**(1)** According to the post-mortem report, although there were altogether 19 incised wounds on the deceased, none of them were fatal wounds. The post-mortem report only stated that the cause of death was 'multiple incised wounds'. In view of the nature of the injuries sustained by the deceased and the time and place of the incident, there was evidence of an intention on the part of the appellant to cause bodily injury to the deceased. In light of such evidence, it was important for the trial judge to appreciate the distinction between the definitions of culpable homicide and murder, under ss. 299 and 300 of the PC before arriving at his decision on the offence of which the appellant should have been convicted. (para 18)

**(2)** The important question to be determined was whether the appellant intended to cause such bodily injuries as he knew likely to cause death or such as was sufficient in the ordinary course of nature to cause death. This question remained unanswered. PW4 should have been asked to give his opinion on the nature of the injuries and its likely and natural effects. However, he was not asked any questions on this crucial point. Accordingly, the evidence in this respect was wanting and, therefore, the offence of which the appellant should have been convicted was culpable homicide for causing such bodily injury as was likely to cause death, and not murder. (para 19)

***Obiter***

**(1)** The outcome of a prosecution on a charge for murder does not turn solely on the testimony of the forensic pathologist. The forensic pathologist does not carry the burden of the case. His testimony is a factual and objective presentation of his autopsy findings and his opinions on the correlation of the autopsy findings with other case information. Even though he is called by the prosecution to testify, he is, first and foremost, an expert witness who should be impartial, objective and independent. Whether the appellant intended to cause such bodily injuries as he knew likely to cause death or such as was sufficient in the ordinary course of nature to cause death so as to constitute the offence of murder, were questions which should have been asked of the forensic pathologist by the prosecution during the trial. (para 20)

***Bahasa Melayu** Headnotes*

Perayu dituduh di Mahkamah Tinggi, kerana membunuh, satu kesalahan bawah s. 302 Kanun Keseksaan ('KK'). Naratif pihak pendakwaan mendedahkan PW9 menerima satu panggilan telefon daripada perayu yang memaklumkan dia telah menikam si mati. PW9 seterusnya menghubungi PW14 dan memintanya meninjau keadaan si mati. Setibanya di rumah perayu, PW14 menjumpai si mati terbaring dalam lumuran darah dan dia terus membuat laporan polis. Saksi-saksi lain, PW10, PW17 dan PW18, memberi keterangan bahawa si mati, dalam keadaan masih sedar, menyebut nama perayu apabila ditanya tentang kejadian yang berlaku. Bedah siasat yang dijalankan oleh ahli patologi ('PW4') menyatakan si mati meninggal dunia akibat beberapa luka hirisan. Pada penutup perbicaraan, perayu disabitkan kesalahan dan dijatuhkan hukuman mati. Rayuan perayu ke Mahkamah Rayuan, terhadap sabitan dan hukumannya, tidak berjaya. Maka timbul rayuan ini atas alasan (i) keterangan PW4, satu gabungan keterangan pakarnya dan salinan semula laporan bedah siasat, mengandungi kelemahan dan kekurangan; (ii) PW4 tidak menerangkan 'kesan-kesan yang berkemungkinan dan semula jadi' kecederaan-kecederaan; (iii) tiada keterangan oleh PW4 yang mengatakan kecederaan-kecederaan ini cukup, dalam keadaan lazim menyebabkan kematian, telah menyebabkan kematian; dan (iv) sabitan bawah cabang ketiga s. 300 KK tidak disokong keterangan yang dikemukakan oleh keterangan PW4. Rayuan perayu atas isu perlembangaan pengenaan hukuman mati ditangani dalam penghakiman yang berasingan (sila rujuk JT7).

**Diputuskan (mengetepikan sabitan dan hukuman atas kesalahan membunuh bawah s. 302 Kanun Keseksaan dan menggantikannya dengan sabitan atas kesalahan mematikan orang secara salah yang tidak terjumlah sebagai membunuh bawah s. 304(a) Kanun Keseksaan dan hukuman 15 tahun penjara)**

**Oleh Vernon Ong Lam Kiat HMP menyampaikan penghakiman mahkamah:**

**(1)** Menurut laporan bedah siasat, walaupun terdapat 19 luka hirisan kesemuanya pada si mati, tiada satu pun luka yang boleh mendatangkan maut. Laporan bedah siasat hanya menyatakan kematian berpunca daripada beberapa luka hirisan. Berdasarkan sifat kecederaan yang dialami si mati dan tempat dan masa kejadian, terdapat keterangan tentang niat perayu untuk menyebabkan bencana tubuh pada si mati. Berdasarkan keterangan sedemikian, penting buat hakim bicara mengamati perbezaan antara takrif mematikan orang secara salah dan membunuh, bawah ss. 299 dan 300 KK, sebelum mencapai keputusan tentang kesalahan yang patut disabitkan atas perayu.

**(2)** Soalan penting yang perlu diputuskan adalah sama ada perayu berniat menyebabkan bencana tubuh yang dia ketahui berkemungkinan akan menyebabkan kematian atau cukup, dalam keadaan lazim semula jadi menyebabkan kematian. Soalan ini kekal tidak terjawab. PW4 sepatutnya ditanya tentang pendapatnya tentang sifat kecederaan dan kesan-kesan berkemungkinan dan semula jadi. Walau bagaimanapun, tiada apa-apa soalan tentang hujahan penting ini yang diajukan padanya. Oleh itu, tiada keterangan tentang hal ini dan, berikutan itu, kesalahan yang sepatutnya disabitkan atas tertuduh ialah mematikan secara salah kerana menyebabkan bencana tubuh yang berkemungkinan menyebabkan kematian, dan bukan membunuh.

***Obiter***

**(1)** Hasil keputusan pihak pendakwaan terhadap satu pertuduhan membunuh tidak bergantung sepenuhnya pada keterangan ahli patologi forensik. Ahli patologi forensik tidak memikul beban kes. Keterangannya berdasarkan fakta dan penerangan objektifnya tentang dapatan-dapatan autopsi dan pendapatnya tentang hubung kait dapatan-dapatan autopsi dengan lain-lain maklumat kes. Walaupun dia dipanggil oleh pihak pendakwaan untuk memberi keterangan, dia, pertama sekali, seorang saksi pakar yang sepatutnya saksama, objektif dan bebas. Sama ada perayu berniat menyebabkan bencana tubuh yang dia tahu berkemungkinan akan menyebabkan atau cukup, dalam keadaan lazim semula jadi menyebabkan kematian untuk membentuk kesalahan membunuh, adalah soalan-soalan yang sepatutnya diajukan pada ahli patologi forensik oleh pihak pendakwaan semasa perbicaraan.

**Case(s) referred to:**
*Cheong Kam Kuen v. PP [2012] 8 CLJ 537 FC* ***(refd)***
*Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC* ***(refd)***

**Legislation referred to:**
Penal Code, ss. 299, 300(c), 302, 304(a)
Rules of Court 2012, O. 40A r. 2(1), (2)

**Other source(s) referred to:**
Milton Helpern MD & Bernard Knight MD, *Autopsy, The Memoirs of the World's Greatest Medical Detective,* Star, 1979, pp 61-65

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*For the respondent - Nik Suhaimi Nik Sulaiman, Umar Saifuddin Jaafar, Mangaiarkarasi Krishnan, Faizah Salleh, Ku Hayati Ku Haron, Asmah Musa & Muhammad Azmi Mashud; DPPs*

*[Editor's note: For the Court of Appeal judgment, please see Pubalan Peremal lwn. PP [2018] 1 LNS 675 (varied).]*

*Reported by Najib Tamby*

## JUDGMENT

**Vernon Ong Lam Kiat FCJ:**

**Introduction**

**[1]** The appellant was charged with murder under s. 302 of the Penal Code. After a full trial at the High Court and hearing of 24 prosecution witnesses and three defence witnesses, the appellant was convicted on that charge and sentenced to death. The appellant's appeal to the Court of Appeal against the conviction and sentence was dismissed. This is the unanimous judgment of this court and it deals with the appeal against conviction and sentence. It does not deal with the question of the unconstitutionality of the mandatory death sentence prescribed under s. 302 of the Penal Code. The constitutional point will be taken up in the separate written judgments of my learned brother Azahar Mohamed CJM and of my learned sister Nallini Pathmanathan FCJ.

**[2]** The incident giving rise to this case took place at between 12 noon and 1pm on 4 November 2013 at house No. 7, Jalan Timah 1, Taman Timah 1, 43800 Dengkil, Selangor. The house in question was occupied by the appellant and his family together with two brothers in law, one Manmathan a/l Doraisamy ("PW10") and Murali a/l Doraisamy ("the deceased"). The appellant's wife one Kalaiselvi a/p Doraisamy ("PW18") is the elder sibling of the deceased. One day before that date coinciding with the second day of Deepavali, the appellant planned to hold a gathering at his house to celebrate Deepavali with his workmates. To that intent, the appellant's workmates came to the house to set up the tent and make preparations for the gathering. The preparations were disrupted by the appellant's brothers in law (one Murthi a/l Doraisamy ("PW9"), PW10, and the deceased) and their aunties because they objected to the same. The appellant alleged that PW9 and PW10 assaulted him. However, notwithstanding the disruption the party proceeded and ended at 2am on 4 November 2013. With that background showing the estranged relationship between the appellant and his brothers in law, it is alleged by the prosecution that the appellant attacked the deceased with a sharp object.

**[3]** Later that day at about 1:02 pm, PW9 received a phone call from the appellant informing that he had stabbed the deceased. PW9 subsequently contacted his cousin one Kanakaraaju a/l Ayer ("PW14") and asked him to check on the deceased's condition at the appellant's house. On arrival, PW14 found the deceased lying in a pool of blood on the floor in a room on the upper floor of the house. PW14 then made a police report at the Balai Polis Dengkil and called for an ambulance.

**[4]** Meanwhile, PW10 after being informed of the incident by the appellant's wife PW18, went to the house together with one Pandiyan. They found the deceased in a conscious state and able to talk. In response to PW10's questions as to who assaulted him, the deceased said that it was the appellant alone that did it. Two other witnesses, one Kalaivanan a/l Nadarajah (PW19) and one Gunentren a/l Pandiyan (PW17) who subsequently came to the scene also heard the deceased uttered the appellant's name when the deceased was asked what happened.

**[5]** The deceased was brought to the Putrajaya Hospital and pronounced dead at 1:45pm on 4 November 2013. According to a post-mortem examination of the deceased conducted by Dr Siew Sheue Feng ("PW4") a forensic medicine specialist ("the pathologist") on 5 November 2013, there were 19 incised wounds on the body of the deceased. The pathologist testified that in his opinion the cause of death was "multiple incised wounds".

**Submissions**

**[6]** The appeal against conviction was brought on one principal ground and it is this: that there were infirmities in the evidence of the pathologist in that the evidence of the pathologist was lacking. Learned counsel for the appellant argued that the conviction under the third limb of s. 300 of the Penal Code could not be supported by the evidence adduced by PW4's evidence. Firstly, PW4's witness statement is essentially a combination of the expert evidence of PW4 and a reproduction of the post-mortem report. Both the witness statement and the post-mortem report concluded that the cause of death was "multiple incised wounds". PW4 did not describe "the likely and natural effects" of the injuries. Secondly, PW4's oral evidence is very sketchy. During examination-in-chief, PW4 was asked "From the injuries sustain ... have any survival chances for the deceased?" to which PW4 answered "No." However, in cross-examination, SP4's answers contradicted what he said in examination-in-chief:

> Q: There no wound that is ... in major part of the body?
>
> A: Yes.
>
> Q: Not wound to cause death of this person?
>
> A: This wound more to defence wound.

**[7]** Learned counsel argued that PW4 did not say that the wounds would cause the death of the deceased, contradicting his earlier evidence in examination-in-chief about the chances of survival. As a whole, PW4's evidence was skimpy, sketchy and devoid of any further elaboration because the learned DPP did not ask any questions in re-examination of PW4. As such, the learned trial judge erred when he failed to appreciate that part of

PW4's evidence which did not say that the wounds would cause death. That part of the evidence of PW4 is relevant to show the degree of *mens rea*, whether the appellant had the necessary intention to cause death or injuries.

**[8]** Accordingly, learned counsel submitted that the infirmity of PW4's evidence with regard to the prosecution's case is compounded by the fact that there was no evidence from PW4 on the nature of the injuries and its likely and natural effects, citing *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174, (FC) in support. There was no evidence by PW4 to say that the injuries were sufficient in the ordinary course of nature to cause death.

**[9]** Learned counsel also argued that the need to address the degree of *mens rea* will inevitably bring into focus the differences between ss. 299 and 300 of the Penal Code, which point was underscored in the recent judgment of this court in *Cheong Kam Kuen v. PP* [2012] 8 CLJ 537; [2013] 2 MLRA 1, (FC); which judgment opined that on the question whether the appellants intended to cause such bodily injuries as they knew to be likely to cause death or such as is sufficient in the ordinary course of nature to cause death, the medical witness should have been asked to give his opinion on the nature of the injuries and its likely and natural effects. As such, the failure of the learned trial judge to discuss on the degree of *mens rea* and the relevant limbs of s. 300 is a serious misdirection. Accordingly, it was submitted that the murder conviction ought to be set aside and substituted with one of culpable homicide falling under the first part of s. 304 of the Penal Code.

**[10]** In reply, learned Deputy Public Prosecutor ("DPP") argued that there was ample and sufficient evidence through PW4 to show that the injuries inflicted on the deceased caused the death of the deceased. PW4 testified that in his opinion the cause of death was multiple incised wounds; of which there were altogether 19 deep incised wounds on the deceased. PW4 also testified that from the injuries sustained there were no chances for survival for the deceased. Learned DPP also argued that *Tham Kai Yau* (*supra*) is distinguishable as it dealt with the four cases (paras. (a) to (d)) under s. 300 whereas in this case, the prosecution was relying on only the third case (para. (c)) under s. 300. Learned DPP conceded that even though there was no direct evidence as to which incised wound caused death, the nature of the injuries inflicted on the deceased can be taken to be sufficient in the ordinary course of nature to have caused the death of the deceased. At any rate, there was no miscarriage of justice and the conviction is safe and appellate intervention is not warranted.

**Role Of A Forensic Pathologist**

**[11]** The main thrust of the appellant's argument relates to the infirmities of the evidence of PW4, the forensic pathologist. We think that it is important to revisit the role of a forensic pathologist as an expert witness, especially in the context of a criminal trial. Put simply, an expert witness is a person whose level of specialised knowledge or skill in a particular field

qualifies him to present his opinion about the facts of a case during legal proceedings. An expert witness's overriding duty is to provide independent, impartial, and unbiased evidence to the court. The fact that the expert witness is called by one party does not detract from the overriding duty to the court. It is the duty of an expert witness to assist the court on the matters within his expertise. This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid (see O. 40A r. 2(1) and (2) of the Rules of Court 2012).

**[12]** In a book entitled *Forensic Pathology, Principles and Practice* (Elsevier Academic Press, 2005), co-authors David Dolinak, MD, Evan W Matshes, MD, and Emma O Lew, MD presented an illuminating overview of the role of a forensic pathologist. Their observations may be distilled as follows:

(i) The forensic pathologist should understand what his role is in the legal process before providing testimony. As a competent and acute observer in the laboratory he testifies as to his factual findings and opinions in a clear, straightforward, unbiased, and professional manner.

(ii) The "testimony" actually begins in the autopsy room where the anatomic studies are conducted to his professional satisfaction. At this time, the forensic pathologist must recognise, collect, and preserve medical evidence and prepare a report of such findings for possible future testimony.

(iii) On the stand, the forensic pathologist does not simply testify as to cause and manner of death. Much of the forensic pathologist's testimony revolves around autopsy findings and the correlation of the autopsy findings with other case information. This requires expanding the case file and one's critical review of the information to the fullest. This may involve ancillary information collected to enhance findings and support conclusions.

(iv) The forensic pathologist interprets how a death came about and may be questioned on various aspects of the death such as what type of instrument may have been used to inflict the injury, and how long an injured individual may have been dead until he was found. The forensic pathologist's observations must be of high professional caliber and be thoroughly and well documented.

(v) There are two key features of sound medical testimony: (i) scientific validity; and (ii) personal impartiality. As for scientific validity, the forensic pathologist is to restrict his testimony to facts objectively noted, analysed in detail, and accurately recorded, and to opinions solidly derived from these data. The forensic pathologist's observations must be of high professional caliber and be thoroughly and well documented. Regarding personal impartiality, the forensic

pathologist, although usually called to testify by the prosecution, must give fair and dispassionate testimony and must not permit himself to become a prosecuting witness. His testimony must not be "prosecution minded" or "defense minded," for he is not testifying for or against either party. The goal is to present the truth as he sees it, willingly and unemotionally doing what is possible within the bounds of unbiased and disinterested observations to help the court reach a just decision.

(vi) The value of the most competently performed autopsy is diminished in the courtroom if the information derived from it is presented by a poor witness: one who mumbles, argues with counsel, or commits a number of other violations of good and proper testimony.

(vii) The forensic pathologist's opinion must never be biased for or against the prosecution or defence. It is a factual presentation of evidence collected during the course of an entire death investigation.

(viii) The forensic pathologist does not win or lose a case. Although the anatomic findings and opinions are important and necessary, rarely do they alone permit the court to come up with an enlightened decision. So long as the forensic pathologist is mindful of his role, including what is expected of him, and knowing the limitations of what he can say, and "knows that it is up to the attorneys to ask the appropriate questions to win or lose the case", then the forensic pathologist as an expert witness, through experience, will become more comfortable in his role and provide effective, appropriate, and proper testimony.

**[13]** The importance about the independence and impartiality of the forensic pathologist as an expert witness was underscored in *Autopsy, The Memoirs of the World's Greatest Medical Detective*, Milton Helpern MD and Bernard Knight MD (Star, 1979) at pp. 61-65:

> ... People often don't appreciate that an expert witness – or any witness, for that matter, isn't called to the stand to root for any particular side in the case. He's there to describe what he found and to offer his conclusion and interpretation based on all of those findings, whatever they may be. He is not there to win the case for one side or the other. If his conclusions were adverse to the prosecution or the defence, they would not have put him on the stand to testify in the first place – and if his medical opinion was all that adverse to the prosecution, then the case should never have gone as far as trial.
>
> So, the medical witness shouldn't be outrageously partisan, whatever side he is called for. We are sometimes accused of getting up on the stand and saying only whatever happens to suit the party that calls us – but people don't see the occasions when we've told our clients that what we have to say won't do them a damn bit of good – and maybe will do them a lot of harm; they don't see us then, because we don't get put on any stand.

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## Decision

**[14]** In essence, the issue canvassed by learned counsel for the appellant relates to the question of what offence the appellant should have been convicted. The appellant's argument is premised on the ground that the learned trial judge failed to consider that where there is more than one
B inference which can reasonably be drawn from a set of facts, the inference most favourable to the appellant should be adopted.

**[15]** In cases of personal violence resulting in death it is necessary for the trial judge to have directed his mind on the issue of degree of *mens rea* in the
C mind of the appellant. Whilst intention is a matter of inference, in actual practice it is frequently a matter of considerable difficulty to come at a conclusion by application of this principle because of the close proximity that the Penal Code makes between intention and knowledge. Admittedly, in the first place, the provisions relating to murder and culpable homicide are very technical. Apart from the distinction between intention and knowledge,
D the Penal Code also draws subtle distinctions between the degrees of intention to inflict bodily injury. Further, if after a thorough evaluation of the evidence the trial judge comes to the conclusion that the offence committed is not murder but culpable homicide, then it becomes necessary to determine whether the appellant should be convicted for culpable
E homicide under the first or second part of s. 304 of the Penal Code.

*Distinction Between ss. 299 And 300 Of The Penal Code*

**[16]** We take the view that trial judges would do well to bear in mind the following passages on the important distinction between ss. 299 and 300 of
F the Penal Code elucidated succinctly by Raja Azlan Shah FJ (as HRH then was) in *Tham Kai Yau*, at pp. 176-177 (MLJ) of the report:

> Section 299, Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely
G to cause death; (c) with the knowledge that … the act is likely to cause death.
>
> Section 300, Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender knows to be
H likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and … is sufficient in the ordinary course of nature to cause death; (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.
>
I The words I have italicised show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1). The offence is always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. Whether the offence is culpable homicide

or murder depends on the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. Illustration (d) of section 300, Penal Code is a case of this description. Where the offender knows that the particular person injured is likely either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of section 300, Penal Code is a good example. The essence of (b) and (3) is this. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. Illustration (c) given in section 300, Penal Code is an example. It is on a comparison of these two limbs of section 299 and section 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability.

A comparison that frequently arises in the application of sections 299 and 300 is the tenuous contention that section 299 is not a substantive offence and therefore an offence is either murder or culpable homicide according to whether or not one of the exception to section 300 apply, and if by reason of the absence of the necessary degree of *mens rea* an offence does not fall within section 300, it cannot be one of culpable homicide not amounting to murder punishable under section 304, Penal Code, but would amount to causing grievous hurt. In our view, the correct approach to the application of the two sections is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to section 300, Penal Code apply, and (b) where the necessary degree of *mens rea* specified in section 299 is present, but not the special degree of *mens rea* referred to in section 300, Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within section 300, Penal Code must necessarily fall within section 299, but all cases falling within section 299 do not necessarily fall within section 300. The first part of section 304, Penal Code covers cases which by reason of the exceptions are taken out of the purview of section 300, clauses (1), (2) and (3) but otherwise would fall within it and also cases which fall within the second part of section 299, but not within section 300, clauses (2) and (3). The second part of section 304, Penal Code covers cases falling within the third part of section 299 not falling within section 300, clause (4).

**[17]** For completeness, ss. 299 and 300 (*sans* illustrations and explanation notes) define culpable homicide and murder as follows:

**299. Culpable Homicide**

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

A **300. Murder**

Except in the cases hereinafter excepted, culpable homicide is murder –

(a) if the act by which the death is caused is done with the intention of causing death;

B (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily harm to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

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(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

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**[18]** According to the post-mortem pathologist's report, there were altogether 19 incised wounds on the deceased though none of them were fatal wounds. The post-mortem report only stated that the cause of death was "multiple incised wounds". In view of the nature of the injuries sustained by the deceased and the time and place of the incident, there was evidence of an intention on the part of the appellant to cause bodily injury to the deceased. In the light of such evidence, we think that it is important for the trial judge to appreciate the distinction between the definitions of culpable homicide and murder under ss. 299 and 300 of the Penal Code before arriving at his decision on the offence of which the appellant should have been convicted.

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**[19]** In the particular circumstances of this case, the important question to be determined was whether the appellant intended to cause such bodily injuries as he knew likely to cause death or such as is sufficient in the ordinary course of nature to cause death. Unfortunately, in the present case, the critical question remains unanswered; in our view, PW4 the forensic pathologist should have been asked to give his opinion on the nature of the injuries and its likely and natural effects, but he was not asked any questions on this crucial point. Accordingly, the evidence in this respect is wanting. As there is no evidence on the nature of the injuries and its likely and natural effects, then the offence of which the appellant should have been convicted is culpable homicide for causing such bodily injury as is likely to cause death and not murder. Accordingly, we set aside the conviction for murder, and substitute it with one under limb (a) of s. 304 of the Penal Code.

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**[20]** We take this occasion to stress in passing that the outcome of a prosecution on a charge for murder does not turn solely on the testimony of the forensic pathologist. The forensic pathologist does not carry the burden of the case. His testimony is a factual and objective presentation of his autopsy findings and his opinions on the correlation of the autopsy findings with other case information. Even though he is called by the prosecution to testify, he is first and foremost an expert witness who should be impartial, objective and independent. In the final analysis, whether the appellant intended to cause such bodily injuries as he knew likely to cause death or such as is sufficient in the ordinary course of nature to cause death so as to constitute the offence of murder, are questions which should have been asked of the forensic pathologist by the learned DPP during the trial.

**[21]** After hearing of submissions on sentencing, we imposed a sentence of 15 years imprisonment to take effect from the date of his arrest.